December 28.

Bill filed 24 May 1831.

Wheaton & Donaldson } Motion to dissolve an injunction.
vs
Peters & Grigg

J. R Ingersoll Esqr. for Deft. Read bill condensed

Wheaton no party to this suit. having not been sworn to bill—

June 1828: A — Proposals for publishing condensed reports signed by Peters Reporter of Supreme Court

2 March 1831 — B — Proposals refused to in a letter to Grigg — Peters offers to indemnify for the publication of condensed reports—

25. Sept 1828 — Letter from Donaldson to Peters offered to show the knowledge of Donaldson of the intended publication—

Mr Cadwalader objects—

Peters promised to respect the right of Wheaton & branch a the facts be taken from the office records

Three years after the bill was filed alledging that the matter in the condensed reports was taken from Wheaton & not record & this part of the bill is not answered—

On a question of this kind Plff is bound to take answer as true so far as it is correct & Deft must take the bill as true so far as not answered—waived

4 Wash. 514. No affidavit—must be special—that he is inventor—

Rudd Spr. 71. 2 — Affidavit of merits—special as to merits & threat.

Anst. 66. 2 V & B. 351. Must make such an affidavit as discloses a case within the law

Act of 1802 makes it requisite to have benefit of the act that he

4 Wash. 487. 8. Should do certain acts—they must appear in the affidavit.

Miller case &c If Plff dont publish a copy of record Equity will not interfere provisions of law not directory—but performance is necessary to give a right or relief

7 D & E 620 — Action lies tho book not entered at Stationers Hall

St. of Geo.

Bill does not bring the Plffs case within law & affidavit dont help it.

Donaldson says he does not know how facts are on account of the absence of Mr Wheaton

As to 1 Vol say he has been informed by Carey that all requisites have been performed.

Where only a few passages copied party must go to law –

Deft ought to state what has been copied

Altering the title page would make same work or the greater par

of the work published

It depends on the quantity pirated –

Adding notes to alter the book – makes no difference

Injunction may be on particular parts but then it must leave

the work a parcel of detached sentences

If doubtful – refer to master to ascertain extent – to bring such

keep an account

401. 2. May be doubt of legal title but equitable title party must admi

legal title

6. V. 707. Title doubtful but possession – Inj granted –

1 Jac & W. 461. Presume title regular till contrary

13. V. 236 – Difference between a mine open & opening a mine –

Cases where refused are where title appears to be bad tho possession

Cases on affidavits were where the question arose before answer

So far as Deft answers no need of one – if matter not answered

Deft is in default

But Deft is bound, to answer only to so much as is well alleged –

4. Wash. 53. After answer no affidavit necessary –

Any one affidavit is sufficient enough in patents & copy

3 Mer 624 Semb. not after answer.

Before answer affidavit may be amended –

4. Wash. 514. Affidavit – for Inj. till answer.

Need not repeat what is in the bill

If he need not answer but does answer waives the defect.

Bill so far as precise & positive & not denied by a responsive answer

is in this stage of cause to be taken as true

So answer if direct precise & positive according to the settled meaning

of the words.

If traverse is evasive or argumentative Court will go on & hear ca

Bill page 13. Bill alleges – Defts work contains all Wheatons reports & violates

right

Ans. p. 1 – States – same were published denies that it contains the same

as he has stated – is evasive – & by reference

Specifies no cases & no pages

Pltt avers largely Deft traverses particularly

Denies it is a direct violation of copy right not an indirect one

the substance of the bill

Denies it contains all not that it contains none.

Answer in another part answers part as to being evident

4 Ves. 440. 410. Mit. 246. 7 Select cases in Ch 53

2 Eq Ca. 67. 8. Toth. 70. 2 Mod 343. Rules of pleading in Equity.

Answer don't destroy Pltffs case unless matter in the answer is inconsistent with the matter stated in the bill –

3 Story 1639.

1802. 1813 Reporters Salary & to deposite copy with Secy of State

Bill p. 8. Believes a copy was so deposited by Pltf that is under the reporters law.

It is matter of law whether this is a compliance with the copyright law –

Answer sets up a point of law don't deny the fact –.

It may be at the hearing decided to be an avoidance – but this not necessarily so.

Suggestion of a legal objection & prayer to be taken as a plea is pro tanto a demurrer.

Injunction is asked from Vol 2 to 12 threatened to be done on same plan as what has been done –

Wheaton did deposite copies as part of the library of State dept – & not usual to have duplicates

1. Wheaton is not conducted according to the prospectus which says – that statement of case shall be taken from office records

Bill says it is taken from Pltfs Reports –

Prospectus says nothing shall be put in except from office records

Altho this Pltf had a right to presume that every thing to be done by Mr Peters was to be according to law –

1. Question — Are the reports of the Supreme Court the subjects of literary property

While a work is in manuscript the delivery to another to publish he becomes the proprietor –

Gift with delivery passes property no writing is necessary

Appointment of Reporter per se is a transfer of property

3 D. B. 77. by the gift of book – same as if he made it.

Reporter is author of his reports –

originates by his mental knowledge – preparing & adapting to public use

A writer is an author unless a plagiarist or copyist – one copies what is another as his own – the other professes to copy

If mental exertion & thing produced is new or not produced before this is not property in the subject but property in the book or work produced.

In addition to requisites – does not decide that 3 & 4 sections of 1790.
it only brings up the Qu. what are requisites.
1. L. R. 397. perpetual Statute –
1. Wh. 123.4. rules of construction
41. Geo. 3d God. 417. In addition to 9 copies required by St. of Anne
16. E. 317. This did not make statute of Anne in this respect conditional –.
Substantial compliance with penal law saves a forfeiture
Specially after the right vested

Right at common law –.
4 Burr 2408. 17 Settled right to book before publication 9 to 3. &
So after a publication 8 to 4.
Copyright had become a known term at law –
Maugh. Introd 12. 33. Injunctions had been granted in Chancery
Laws N. H. 161. – Law for securing to authors – reciting the right. After the peace –
Do – Mass. 369 – Copies preamble & title from law of N. H.
Do Connecticut 133. principles of natural equity & justice to have such right
Do N Carolina – Nothing more strictly his own than fruits of study
Do 2 Vol N Jersey 326 – principles of equity
Do Maryland. 1783. Ch 34. S. C.
Do. Fed Convention Journal 208. 220. 260.1. Secure to Authors to Grant patent
328. To promote the progress of science & the useful arts by
by securing to authors & inventors
Federalist 43. by M. Copy right by common law – with equal reason to inventors
published book is produce of manuscript – Manuscripts –
Ergo purchaser of book has a right to increase or produce – Sell a cow – her calf goes to purchaser
case of inventors is an exception to general rule –
41. Book Pams. F. F. 41. 2. 3. 21. 5
These are proceedings of a bench of Justices published by their authority
They cannot prevent them by their own authority
only jurisdiction is by injunction in this court –
No one can print its proceedings without their authority
It has been [illegible] lately
But if the bench authorize a report of their proceedings they
will prevent it by one not authorized –
Chancery will enjoin this as copyright
1817. Reporter who shall be appointed
1827. A reporter shall be appointed
4 Burr 2329. 2404. 5. Injunction on footing of property
13. V. 502. to 6. Injunction till hearing of Ld. Melville's trial – by order of House of Lords

On case stated & order of House of Lords. Continued injunction

2 Bl. Com. 407 n. h. Decision of House of Lords on St of Anne went to time

7. D & E. 627. 9. Confined to time limited by statute

16 E. 320. Substantive perhaps no right at common law

2. Inst 200 If St of Anne took it away it was by express terms

5 J. R. 175. & B & C 285. 9. 4 Burr 2451. Tenth Cent 24. Pl. 113.

H of Lords struck out Seven & put in rest.

Limited time in Const. means that common law right is to be limited to the same time.

If Statute applies so as to limit a common law right - by what rule can we say that it is not the same of it - If it is within Const in one respect why not in another - It applies to inventors same rights as to authors - after a full knowledge of decision of House of Lords - for E. B. not pretended Inventor had a common law right - & St of Anne had taken away common law right of Authors - Hence the word secure to Inventors - after its meaning had been settled in House of Lords to be "rest."

Mr Chauncey - I shall confine myself to injunction till a hearing -

The principal purpose is to protect an apparent right long enjoyed & possessed - tho right is doubtful

Case is clear right & cont. poss. & long poss. are a prima facie title till it is decided at law -

General rule applied to all property in possession -

Plff has published 12. Volumes - notice on face that a copyright is claimed

He claims right by act of Congress

And as such as property.

Such right not to be definitively settled till a final hearing or to be disregarded

Amount of property is large - & threatened invasion will destroy it

Questions of great magnitude not proper to settle now but where the claim is not palpably bad to protect long possession

After 20 years can Deft question validity of copy right - or for 14 years -.

Question is whether bill contains a case for continuance of injunction

General allegation that they have performed conditions of law.

So Plff has done so generally.

He need not state specially that which he does not know

Deft may deny right as set forth in bill

Renewal is a new patent by the old specification

If law of 1802 converts direction into condition
Still a deposit for renewal is a compliance—

Common law right Reports are a work of labor of the mind
Not necessary to make an author that the matter should be new
If he has reduced it into form— by his mental operations—

Swanst 318–325. House of Lords may prevent publication of their proceedings

5 V. 709. Colorable Abridgment of Term Reports of which Pltff is proprietor— Injunction on filing bill—

Eden 206 — Inj. till hearing not founded on right.

197. House of Lords— order publication of trials by one not ~~the~~ by any other person.

Sessions papers Lord Mayor always appointed a printer of the trials & to take a compensation.

Congress recognise this right by appointing a reporter giving him a salary— requiring 80 copies to be deposited—

Assume that materials are public— why not resort to them & avoid piracy on us

Prima facie our right is good— we have a prima facie case & possession is not denied

Possession is protected till a hearing— agt any person—

Eden 260.

Cases of ejectment The right is doubtful & because it is so not because it is clear—

6 V. 706. 9 S.R. 569.

Wheaton has a right of literary property independently of Statute
Our constitution & Statute differ from Statute of Anne

Mr. Sergeant for Defts.

Difference between patent & copy right— both rest on originality of invention

Patent is prima facie evidence of right. he has none without patent
If patent defective there is no right— not a doubtful right.
In copy right no law furnishes the party with the evidence of his right as in a patent.

Acts of copyright claimant are the patent & the whole of them are only a prima facie case—

What becomes a perfect right.

4 Wash. 487. If no copy right by law— no injunction.

Requisites of copy right under law of 1802.

Have they been complied with—

Words of act of 1802 are clear. including the 3 & 4 sections —

Misrecital of a law has no effect it has the language of enactment

we don't know their intention

Where words are plain there is no room for construction

Act depositing copy is notice he did not claim copyright

Object is preservation in office.

As title page shews nothing. book must be read to know more. then it is necessary

to be read for information. Suppose deposited without recording.

When book is to be preserved Secretary must preserve it

12 Wh. 148. Intention of law —

Plaintiff must shew a literal compliance with the law

Copyright signifies all which compose it —

Have they been complied with.

He must state them all affirmatively

5 Sammary — Bill avers as to 1 Wheaton. Don't state specially that Wheaton did any thing —

Don't state the grounds of belief & information

— We have an issue of law. Conformity ~~[illegible]~~

Bill is an argument

In forms & verily believe that all things necessary to be done

had been done by which he acquired the copyright

He does not state what the party did do —

This is a general & not a special averment of performance —

Bill must contain something to be proven to

Difference between Bill before answer & afterwards

What is here stated if made out at the hearing would not

be sufficient at the hearing

It is at the hearing — hearsay — not admissible

He must shew facts not a conclusion

I believe he has a reservation of matter of law that the depo

is unnecessary..

Plff must shew in bill such a case as will entitle to relief

— at the hearing

In this case no title is set out. the statement is mystified

Donaldson was much bound to make the statement as Wheaton was bound to do

Donaldson & Wheaton
vs
Peters & Grigg.
Notes of Argument in Ct. Ct. 1831.

Supreme Court of the United States.

[JANUARY TERM, 1834.]

WHEATON and DONALDSON, }
vs. }
PETERS and GRIGG. }

Appeal from the Circuit Court of East Pennsylvania.

The appellants filed their bill in the court below, claiming a copy right in 12 volumes of "Reports of Cases argued and adjudged in the Supreme Court of the United States," the complainant Wheaton as author, and the complainant Donaldson as publisher under an assignment from said Wheaton. The bill charged the defendants with having violated the complainants' copy right, by publishing and threatening to publish a book called "Condensed Reports of Cases in the Supreme Court of the United States;" and prayed an injunction to restrain the defendants, for an account, and further relief.

The defendants, in their answer, denied that their publication was an infringement of the complainants' copy right, if any they had; and further denied that they had any such right, they not having complied with all the requisites to the vesting of such right, under the acts of Congress relating to copy rights.

The cause came on for hearing on the bill, answers, and testimony, before the district judge sitting alone in the court below, when the injunction which had been obtained was dissolved, and the bill dismissed.

The appellants will contend :—

1. That an author was entitled at common law to a perpetual property in the copy of his works and in the profits of their publication, and to recover damages for its injury by an action on the case and to the protection of a court of equity.

2. The common law property of an author is not taken away by the Constitution of the United States. The States have not surrendered to the Union their whole power over copy rights, but retain a power concurrent with the power of Congress so far that an author may enjoy his common law property and be entitled to common law remedies independently of the acts of Congress. It is one of those concurrent powers where the power of the State ceases only when it actually conflicts with the exercise of the powers of Congress.

3. But if the States have divested themselves of power over the subject, still they have not given to Congress all the power they possessed. The power of Congress is a limited and qualified and not a plenary power. They have not a general power to regulate the rights of authors for the public good as well as for the security of the author, nor was it intended by the framers of the Constitution to give them such a power. They have not the power for any purpose or in any manner to impair the property of an author, or annex conditions to his right of enjoyment of it. Their power is to *secure his right*; and the only necessarily implied power springing from this express power, is, that they can annex such conditions to the security they give as they may think proper.

4. A citizen of one State has the same common law property in his copy in other States, as the citizens of those States might have. And this common law property exists in the State of Pennsylvania: consequently the complainants are entitled to a copy right at common law in that State, and can have a remedy in the Circuit Court of the United States for its violation, independently of the provisions of the acts of Congress; the citizenship of the parties giving that court jurisdiction.

5. The publication of the record in the newspapers, and the delivery of the copy to the Secretary of State, are not made conditions precedent at all by the acts of Congress, or if at all, only as to the right to the security provided by the acts. A non-observance of the statutory directions in these particulars, does not deprive the author of the ordinary remedies by an action on the case and bill in equity. Besides, the publication of the record, and delivery of the copy, were at most intended only as means of notice of the author's right; and actual notice, in this case abundantly shown, dispenses with those modes of constructive notice.

6. The directions of the acts of Congress as to the publication of the record and delivery of the copy to the Secretary of State have been complied with, and the complainants have offered all the proof, they are bound to, of those facts.

7. Law reports, like other books, are objects of literary property; and Mr Wheaton was the *author* of the reports in question in this case, and entitled to the copy in them. The other complainant, Mr Donaldson, has a limited property in the copy by assignment from Mr Wheaton.

8. The publication of the defendants is a violation of the complainants' rights.

D. WEBSTER.
E. PAINE, for Appellants.

Supreme Court of the United States.

HENRY WHEATON, and ROBERT DONALDSON, *Appellants,*

vs.

RICHARD PETERS, and JOHN GRIGGS, *Appellees.*

The appellees, will submit the following points, for the consideration of the Court:

I. That the book styled "Wheaton's Reports," is not lawfully the subject of exclusive literary property.

II. If the book of reports of the complainants be susceptible of exclusive ownership, such ownership can be secured only by pursuing the provisions of certain acts of Congress.

III. The provisions of the acts of Congress have not been observed and complied with, by the complainants or others in their behalf.

IV. Reports of the decisions of the Supreme Court, published by a Reporter appointed under the authority of the acts of Congress, are not within the provisions of the laws for the protection of copy rights.

V. The entries of the copy right by the appellant, claim more than Mr Wheaton was, in fact or in law entitled to, as "author" "proprietor," "author and proprietor" and were for this cause void.

VI. The work styled Condensed Reports, is not an illegal interference with the right, whatever it may be, in Wheaton's Reports.

JOHN SERGEANT,
I. R. INGERSOLL,

For the Appellees.

28. October -

Wheaton vs Peters & Grigg.

Motion by Deft for a continuance on affidavit of Deft filed -

Mr Cadwallader - opposed the application -

The subject of controversy is a copy right which will soon expire

Deft has had an opportunity of taking the deposition of Mr Brent - since he would be a witness - & that he was appointed a consul in Paris long before he failed -

Every thing in these depositions has been testified to by Mr Geo Brent.

This is like an application for a new trial on the ground of newly discovered evidence -

Mr. Chauncey. Affidavit is on the ground that depositions taken by Pltf make it necessary to reexamine Mr Brent -

If the witnesses had been examined in Court it would be [illegible] it the no ground of continuance or a new trial - nor is it new. Deft knew that Mr Brent was cognizant of the matters in the deposition -

Mr Jos R. Ingersoll -

The issue was directed 26 May or rather this suit was then in order - Mr Brent failed on the 1 May -

Mr Peters became acquainted with certain facts only by the deposition. & it is not material how he acquired the knowledge. The fact alluded to is that on the certificate of the 1. Vol of Wheaton's reports in the department of State the words D. State are appear - & there are others - a pen-mark of the face of the book - & some others -.

This is the first Court since the commencement of the cause & Deft has a right to a continuance on liberal principles

Donaldson v. Pilon

Rec. 8 — × The bill prays for an injunction & account. nothing more

× Plffs had been in possession of a copy right of Vol. 1. for 15 years
without disturbance & ~~a renewed one for 6 months~~

× Under color of title Vide 1. Vol. — title that

Rec. 9.10.11. × Defendant had notice & promised to respect these rights —
in 1828.

Rec. 24.51 × Also a renewed record & publication for a further term in
Rec 24. 5. 51. 1830 —

Rec. 56.7-8. × Deft in 1831. determined to encounter every difficulty — will
2. March. 1831. indemnify the publisher —

× Has moved by a purchaser for a valuable consideration
& without notice

58 × Challenged a suit. i.e. he admits the invasion

× on what does he rely —

57 × A technical objection — no deposite in Department of State
of the one copy —

× The 80 copies were delivered in fact —

× Will a Court of equity enquire into such a matter after
15 years possession in favor of a mere pirate with the
most explicit notice

× And against an innocent purchaser without notice

× The deposit was required for information only. Deft
had it.

× What is it to him whether it was deposited under the library
law or the copy right law —

× He was not injured — or any of his rights impaired he had
none — his is a mere trespass —

× He has published 3 volumes during the pendency of this bill &
after an injunction

For the appeal suspends the decree of dismission —

3 Story 1719. × What is the course & principles of equity in such a case

× The laws of 1819. & 1831 assist them

× Did a Court of equity ever listen to such objections in such a case

× Even as here the record was in 1822. Bill decided in 1824.

× The omission of publication was admitted —

× Judge W held there was no color of title or right & that Plff could
not recover at law —

X In this caſe ſo far from being admitted the publication is ſported
And attempted to be proved
X It is a mere queſtion of fact on which a jury ought to paſs
X They may find it from evidence or legal preſumption
X A chancellor never decided on ſuch a queſtion without an iſsue
adverſely to long poſseſsion ~~in favor of a purchaſer~~ against
a purchaſer without notice & an invaſion with notice —
The conſtruction of an act of Congreſs is a mere legal queſtion
X But here there was a record publication & deposit in 1830
This makes a good renewed right as the former was unqueſtioned
X As an original copy right it is good —
The Ct can decree a perpetual or a temporary injunction
X till a trial which they may direct
X This is within the diſcretion of the Court
9 Wh. 8 Wh. X An amended bill & supplemental may be filed —
X W. S. could waive the deposit —
Deft sets up no equity in himſelf but relies on their legal defect
Injunction will be granted on an equitable right till a
trial at law. 12 Ves 198. 9.
Poſseſsion by color of title is enough for injunction tho the
right is doubtful & will be continued till it is ſhown to be
mere color. 9 J.R. 567. 70. and will not be diſsolved at the
hazard of the right being eſtabliſhed at law. 9 J.R. 570. 83. 89 —
14 V. 132. 6. 6 V. 707. 10. 3 Mer. 628. Coop. 156. 4 Wash. 489. 260 —
Poſseſsion will not be changed till trial 3 V. 1461. & no tranſmi
be impaſsed —
Where there has been a poſseſsion of ſome duration under it it grants
an injunction putting the party to a trial at law Eden 187. 205. 6.
Theſe caſes ſeldom brought to a hearing Eden 208.
Literary piracy is an offence — St. of Ann the offender. act of 1790. 1802
1831 — Do. 1819. the violation of right
As an universal rule poſseſsion of property is protected
Party not confined to ſtatutory remedy 4 Burr 2386. 6 D & E 620
9 J.R. 586. 7.
The boldneſs & raſhneſs of the infringement. 9 J.R. 589.

1. Qu. Are these reports the subject of copy right—

15 × 1. The difficulty of points decided 2d of the work & volume & the merit of the case — 3 hear. Not only the opinion

× The 3 are the highest & most useful mental labor

× As Story's Index Johnson's Digest Wheaton Harrison Keble —

2. Qu. Has Plff any right at Common Law—

× 1. Bl. Rep. 301. 1762. 4. Burr. 2386 — Special verdict & that in

× fact they passed & were held as property before St of Ann —

× Often decreed as assets by Ld Mansfield 1. W. Bl. 335.

× Not lost by publication 4. Burr. 2417.

× Preamble of St of Ann & Mann. 21. 9 & 11. Sections—

× × Property intended to be secured to the proprietors thereof — 2 Section 8 Cranch 189. Constitution. Act of 1790 — 9. S.R. 582.
By forfeitures — penalties & summary process of something—
This was the security for the existing property during the term
After the term the Author was left to his common law remedy

	8 Ann —		Act of 1790
1 Sect.	Prospective as to Books then published from date of the law & no act required by the author or assignee. New publications the right began on publication without any act	1. Sect	In both cases recording the title required as a condition precedent. The term commenced from record
2. Sect.	As men may offend through ignorance — property intended to be secure to the proprietor or penalty unless before publication entry made at Stationers Hall—	2. Sect.	Publication in a newspaper in lieu of the entry—
5. Sect.	Nine copies to be delivered for the libraries for their use ——	4 Sect.	One copy to the department of State to be there preserved—
1. Sect.	forfeit 2. cents per sheet —— half to informer - - -	2. Sect	50 cents per sheet. Half to the owner.
1831.	Sect. 1. From the time of record. Proviso as to renewal. & all such other regulations complied with. Vide Sect. 3. & Relates to renewal Sect 4 is a condition precedent—	1802.	Sect. 1. is expressly for information—
Sect 5.	Shall give information	1819.	3. Story. 179. Jurisdiction given to circuit courts According to the course & principles of courts of equity. See what is the course adopted S. R. 1831. Pamph. 14. Sect. 9.
S. 6 —	Right rests on recording— No deposit in the department of State is required.		

The acts of Congress impose new conditions — give better remedies & guard [illegible] definite notice — and avoid all doubts on the construction of S

Act of 1790 Section 1. 1 clauſe.

1 Story 94. 5. Exclusive right secured for 14 years after the recording the title for 14 years –

2 clauſe Same proviſions for future caſes – from the time of recording the title.

3 clauſe. And for a ſecond term provided it is a ſecond time recorded & publiſhed within 6 months of the expiration of the firſt term –

This distinction between the 1 & 2d Term shows what Congreſs intended should be a condition & what direction –

Section 2.

If any person from & after the recording & publiſhing he

he ſhall forfeit – to the author or proprietor. one half & one half to the U.S. 50 cents for each sheet.

The 8 Ann ch 19 gives this forfeiture to any informer 7 D. 628.

Sect. 3. No person ſhall be entitled to the benefit of this act unleſs he ſhall depoſit a copy of the the title & the Clerk ſhall record it.

This gives the benefit of recording which is the exclusive right for 14 years –

2 clauſe

He ſhall publiſh a copy of the record in two months or he cannot recover the penalties under the 2. section

But his right under the 1. section is not impaired by neglect to do it.

The law requires nothing but recording to give the right to the thing

4 Section

A copy ſhall within 6 months be depoſited in Office of State to be preserved in the office

This is the declared object – can we make another by construction

He can then have all the benefits of the 1. & 2 sections before this is done –

It is therefore a condition ſubſequent to divest a vested right. of which no individual can take advantage. by invading the right.

The title is complete by recording the publication is only neceſsary to give the forfeiture. 4. Wash. 490.

He is allowed 6 mo to make the depoſit 4. Wash. 53.

Act of 1802. 1. Section Before he shall be entitled to the benefit of the act
In addition to the requisites &c he shall give information
2. Section
He shall have a right to copy rights of prints & engravings
provided &c

This makes all the requisites conditions precedent to the vesting of any right
such is the effect of a proviso generally—

The recital in 1. Section does not make publication & deposit a condition precedent. 3. Day. 158. S. P. as to oath of being the inventor 1. Gall. 433. or 30. Gallison—

It is only directory for the purpose of legal notice & public purposes 3. Day 158.

The recital in a subsequent statute will not make it so 16. E. 325.

As in addition to the 4. copies now required— tho intended by the legislature to express these sense of this provision in the St. of Ann being a condition precedent. 16. E. 326.

The Court will act on the construction of St. of Ann. 16 E. 327. 30.

Tho the legislature have subsequently misunderstood it 16. E. 333 — S. P. 12 Ves. 148.

The same principle applies where a subsequent St omits a condition precedent attached to a right. as in case of prints under 8. G. 2. the condition is carried into them tho not expressed. 4. Bingham. 244. 5.

The 8 Ann is favorably construed in favor of authors not as a monopoly 2. Atk. 143.

Reference to Master to see if Books are the same 2. Atk. 144. Ibid 429— 2 Russ. 400.

An appeal suspends the decree— Patterson J. 3 Dall 87— Cushing 118. 19—

When the equitable title is complete & the legal title doubtful an injunction will issue, an issue will be directed to ascertain the piracy & the deft be ordered to admit the legal title 2. Russell. 401. 2.

Statute of Ann 5. Section Maum 50.
St. 41. George 3. 5. Section Maum. 52.
8. Ann. Sect. 1. & 2 Maum— 21. 22.

In Lance Surgeon employed in a Hospital have an injunction to protect his right in lectures— Maum 154.

A thing required in the last section being defined is not a condition precedent. 4 Wash. 4. 90.

A fortiori not in a separate section. 2. Atk 95.

The 8 Anne & its construction was in view of the legislature 4 Wash. 4 90. which was

Register in Stationers Hall not necessary to give the right 2. Atk 94 cited. [illegible] 7. T.R. 1. Camp. 98. Idem 193 only to give the party a right to the penalty [illegible] is given absolutely during the term. 1 Bl. Rep. 330. 8. 7 T.R. 627. 8. 9. 4 Burr. Yeates. 2380 16. E. 333.

Entry at Stationers Hall was only as notice so that a penalty would not be incurred ignorantly 7. T.R. 627. 16. E. 322. 7. 8.

Action for piracy lies without it 7 T.R. 617. 16 E. 322. 4. 4. Bing. 242. 3.

The right is complete on publication 16. E. 322.
The 5 Section directory tho a proviso. Maum. 55.
So on the act of 8. Geo. 2. as to engravings - the annexing the day of the publication is only directory & the right vests 2. Atk. 94. 5. 6. Tho

193. Barnard Ch. 213. perpetual injunction was decreed. The name not engraved 1. Camp. 98.

in suit at law. Semb – In suits on the H. Vic 5. T. 245. 7 T. 522. 4. Bing. 239. & 3. Wils. [illegible]

the omission aided by verdict. 7. T. 522. The copy is improperly obtained the first publisher may sue a stranger who pirates it 4. Espin 168.

In 2. Atk. 94. the Ch. would not decree an account of profits

because very small – 1. Barnad. 214. tho he granted an injunction on the same principle damages cannot be recovered at law for the injury. 4. Bing. 241. 2.

But he may recover tho the word proprietor is not inserted 4. Bing. 240. 47.

Every injunction proceeds on the supposition of a violation of property. 1. W. Bl. 310.

Vide cases at common law in Equity. 1 W. Bl. 229. 30. 1.

There are many decrees which make these rights of authors 1 W. Bl. 335.
Vide special verdict. 301.
Yeates admission 338.
How would you steal an action or the next turn of an adversary 338.
Reason for patents. 339.
Right to common ways 340. or key. 341 –
Both the 8 Anne & the acts of Congress were made for the security of property

Bill – Charter to Potowmack Co in 1784.

Pltfs owned & possessed 3. Tracts of land on the Margin of River

Admitted – Amsterdam Antietam folly & White Haven –

Condemnation for Canal in 1793.

Wheaton & Donaldson
vs
Peters & Grigg –
Notes of Laws & cases –
for conference Sup. Ct 1834 –

1.

Wheaton vs Peters–

Issue directed by the Supreme Court.

A bill of exceptions to the opinion of the judge who tries at Nisi Prius an issue directed by the Court of Chancery is quite a novelty – 3 Wash. 590. the Ch. acts upon the notes of the judge 4 Wash 37.

In this case the cause was remanded to this Court with directions to order an issue of facts &c 8. Pet. 667. opinion of the Court.

In the mandate the decree is reversed & the cause remanded &c & that such further proceedings be had therein as to law & justice may appertain & in conformity to the opinion of this Court – 699.

The issue is to inform the conscience of the Chancellor & unless he is satisfied he sends back the issue to be retried tho the judge certifies that he is satisfied

One reason is if the parties had not sufficient time to investigate the title 4. Wash 37. or if both judges are not satisfied with the verdict. Vide 1. John Cas 506 & cases cited –

This is then not an adversary suit.

The discovery of material evidence just before a trial is no ground of postponement unless under very particular circumstances.

Deft may avail himself of it on a motion for a new trial Wallace 48. 50

When a party knows a witness is about to leave the country he ought to take his deposition 1. Pet. 218.

Secus where he is an administrator 2 Wash. 164.

Not because Plff had dispensed with an answer to one of his interrogatories which Deft alleged was material to his defence 164.

But where Plff abandoned a commission in which Deft had joined & filed x int. it was allowed 2 Wash 223.

Not where the witness went abroad & the party did not then advert to the circumstance of his being a material witness 4. Binny. 243.4.

Deft proves that A & B were material witnesses without whom he could not safely go on to trial & expected their attendance At the next term the Ct refused a continuance –

If it appears on the trial he was prejudiced the Ct will grant a New trial 3 Burr. 1514. 15. King vs D'Eon.

The affidavit of Mr Peters states that two depositions W. Elliotts taken 27. Sept. & of P. Greenow taken 13 October their testimony has rendered it important and as deft firmly believes essential to procure the testimony of R Daniel Brent in Paris & that he cannot safely go on to trial without it & can be had at next term. that he had no knowledge of the facts testified to before these depositions were taken he has taken out a commission to examine Mr Brent who left this Country in May about the 1st when deponent did not believe that his testimony would be material nor did he at any time so regard it till W Elliotts deposition was taken -
Sworn to 22 October 1834. filed 28th Octr -

Ex.d in chief - The deposition of Mr Greenow. at present Librarian of the Dept of State - has been in the office but a short time only since 1831 -
Produces the 1. Vol Wheatons reports 1. Edition taken from the shelves of the Dept of State library the only one of the 1. Edition

Cross examined Many books have a similar inscription in the inside - Have seen none similar to the writing on the outside the hand writing of which I do not know. that in the inside is said to be Mr Brents know nothing of books deposited for copy right before 1825.
An immense number have been deposited for copy right since 1831. without - Have been Librarian only since 1st July last

Reexamined. Have been translator since 1831 - & have had access to the Library Have often taken on loan from the Librarian copy right books
Refers to Mr Livingstons arrangement.

2. X examined - He knows nothing prior to 1831.
Deposition of W Elliott
Entered patent office as Chief Clerk in September 1816. & remained there till 1829.
Some copy right books were sent to Dept of State some to Pat office generally sent from former to the latter where the record was kept - viz a list shewing the fact & time & no other Dr Thornton used to write in the books "Dept. of State" with the date when received When authors sent a letter with the books a kind of receipt was given they often complained of not receiving them.
He speaks at large as to the practice of the offices - State & patent

3. It was irregular & much neglected in the D of State. of which I complain=ed to Mr Adams but no change took place till Mr Clay came in in 1825. Since that I have kept a regular liſt – & copied ſuch liſts as I found in the office –

Croſs exd – Copy right books were kept or ſuppoſed to be kept in the Pat office before 1825. Speaks of the practice of the Dept.

The liſt ſpoken of was kept from the commencement of the Govt –

I copied the title page of books for copy right.

No volume of Wheaton is entered prior to 1830.

Mr Brent was chief Clerk in 1817. he was in the Dept before

Mr Wheaton & Paine called my attention to 1. Wh in the library one of the ſet. this was in May or June in N York – at Washington examined it the words in Mr Brents hand writing – Department of State & date after the time & the entry was not according to the form in the patent office. the figure 1 was in pencil mark like a bookſeller the book is there yet I wrote to Mr Paine it was not depo=ſited for copy right at leaſt there was nothing from which I could aſcertain it – nothing of the uſual mark

Never knew Mr Brent write in books for copy right –

In May was applied to for my depoſition by Mr Paine & after by Mr Wheaton but declined & ſaid I would rather be examined in Philada.

Reexd in chief Did not mean to ſay Mr Brent did not write in books

Not poſitive if a date is to the entry in 1. Wheaton – will find an exact copy of what is written on the book – it was a Philada bound book

2. X examd. Mr Brent had power to write in books he was ſuperior to Dr Thornton when he became Chief Clerk before that he had nothing to do with the patent office –

Elliotts letter 1. October 1834 agreed to be received as evidence –

On the cover of the 1 Vol of Wh. was written "D. State" but by whom do not know in the inſide of the cover was written U. S. Departm ent of State in the handwriting of Daniel Brent late chief Clerk

the ſtile of binding of this book is different from the other volumes

Daniel Brents depoſition was taken 30 April 1832 Vide record page 40. 41. which was read on the argument in the Circuit Court in 1832 –

4. The Interrogatories filed by Mr Peters are

1. Do you know the parties

2 When did you become Chief Clerk in the D of State & how long were you employed there before you were chief clerk.

3. Before being chief clerk had you any thing to do with the depoſit of books for copy right or know any thing about it.

4. Do you know of a volume of Wh being in the department before you was C. Clerk - & how did it come there -

5 How were books purchaſed for the Dept. & what was written in or on the books for what purpoſe & by whoſe order.

6. For what purpoſe did you put the writing on the inſide U.S. &c Who put the figures 700 in pencil & for what purpoſe From whom was the 1 Vol procured

7. Who wrote D State on the outſide cover of the 1. Vol & for what purpoſe

8 Were you examined on the 30 April 1832. had you then examined the Vols of Wh eſpecially the 1 Vol. & the writing in the firſt Vol & aſcertain the purpoſe for which it was made

9. For what purpoſe did you believe the pencil mark was made

10 Did you ſtate &c in your depoſition - how did you know the fact When did you firſt ſee a volume of Wh & whether you ſaw the 1 Vol & for what purpoſe was it in the Dept.

11. Why & how & when was your attention called to there being a complete ſett of Wh - If you made any entry in the Vol what was it - for what purpoſe

12. Genl. Intry.

Wheaton vs Peters –

Notes on motion to continue

at October term 1834.

11. March — Wheaton & Donaldson

v.

Peters & Grigg

Mr. Paine for the Appellants —.

Mr Wheaton published 12 volumes & till 1827 was in the peaceable possession of the copy right — & he sold it with a warranty —

1828 — Deft proposed to publish condensed reports —

Rec. 9. 10 — Proposals & reasons —

Rec ' he admits the legal rights of Mr Wheaton — intends his to be a substitute for Wh.

Rec 54 — Not intended to injure the reports of Mr Wheaton

the only ground on which he stands is that the facts & opinions were not the subject of copy right

the case of Ewer vs Cox induced him to attack the right of Mr Wh

Rec 12 — Vide his letter to Mr Grigg —

54. Letter from R. Donaldson —

56. Reply of Mr Peters — refusing

55 — The letter of Judge Cranch —

Peters made an arrangement with Judge Cranch —

the first defence was that the work was not the subject of copy right. his next was the non compliance with the law —

Wheaton sent the copy to the Dept of State with the other 80 — prescribed by Congress

Deft took the statement of facts from the Reports of Mr Wheaton without altering one word in condensing the 1. Vol of Wheaton

He did not exercise the right of taking the abstracts of the cases from the Clerks Office —

During the pendency of this appeal Deft has published the 11 Volumes of Wheaton's reports —.

1 — point an author has a right of property in literary works at common law

4. Burr 2396 — Copy is an incorporeal right to intellectual labour

In Germany the copy right is perpetual. So in Sweden & Denmark —

In France it is for life & 85 years & invasion of it is a public offence

4. Burr 2357. 65. says that ideas cannot be appropriated as property

Yet a book can as well be property as a table or a guinea —

All property depends on compact express or implied selling a book

2 Bl. Com. 365. is an agreement that the purchaser shall read it & no more —

& note of Christian he cannot multiply the number of copies —

4 Burr 2310. 35. 95. opinion of Ld Mansfield Willes & Aston

2408. 2 B.P.C. 129 In Donaldson vs Becket 11 to 8 judges resolved that there was a right at Com. law before St. of Anne. 6 to 5. that it was taken away by the

The jury found in Millar v. Taylor that there was a right known
& recognised at Com. Law.

In D. v. B. there was no finding the case came up on bill & answer
& the 28 years had expired — the case was decided on that point
7. B. 616. as stated by the K. B. is that the right was not perpetual

1468. 71. printing introduced in England 4 Burr 2415
1556. Charter to Stationers Company with exclusive right of printing
Maug. 12. They kept a register of authors so as not to interfere with each other
17 2000 copy rights were entered in 1576 —
1556 — 13 decrees of the Chamber protected these rights
1641 — 13. 14 ordinances of parliament till 72. &c —
15. 16. copy right supported by courts
19 & against the prerogative of the crown
20. to 27 — The St. of Ann was to secure the rights of authors — it was altered to giving
a right & gave it for 14 years & no longer
notwithstanding which the courts uniformly declared that authors had a
perpetual right
4. Burr. 2407 — 2. Bl. Com. 1.
Puff. B. 4. Ch. 4. & 5.

2. The Constitution has not taken away the common law right —
the words are securing — copy rights & inventions —
Patent right cannot be enjoyed exclusively without great injury
But there can be a monopoly in copy right without public injury
this distinction is apparent in Gibbons v. Ogden —
Author has a right & remedy at common law but patents depend on
the St. of monopolies in England & here by the power delegated
to Congress to give this security
The vesting power draws after it all incidental powers
Congress cannot create copy rights they existed independent of any St.
Congress have only the power to secure copy rights but not to
legislate on the entire subjects —
The word monopoly was never applied to a book.
3. Story Com. 50. The States may protect patents & copy rights from abroad —
3. The power of Congress is not plenary as to copy rights
this is the only power in relation to private property — is to be
1. Mod. 2. 824 Bac. construed strictly in analogy to cases of statutes
65. 19 Vin. E. 6 Constitution is not in derogation of common right
1. Bl. Com. 87. Or look to old law mischief & remedy — & affirmative statutes do not
2. M. 15. 1 Bl. Co. 89. P. L. 256. 113. take away common law —
1. Story Com 384 Rules for construing the constitution 387 — 397 — 401. expressly given
or by necessary implication 410. 11. 436.
The Const. does not take away the common law right of authors

The word secure is of limited import & does not extend to take a right away. as to secure a debt— by mortgage or bond or other security

The debt remains independent & distinct from the security

The States have merely transferred the legislative power over this subject to Congress it remains with them – the States had it before the Constitution

Suppose Congress had not legislated on the subject — or that they had not given the Federal Courts jurisdiction or no State law gave remedy

From 1790 till 1819. no U. S. Court had no jurisdiction of cases

3 Story 1719 — for the invasion of copy rights —

The contest in England was on the words of the Statute of Ann — Secure &c —

19. Vin 510 &c. Statutes supposed to alter the common law no further than is expressed

2 Co Inst 200 Pl 113. & cases — & no remedy exists but what is given by Statute

7. D. 616 — Cases of the Statute giving an additional remedy 5 S. R. 155.

1. J.R. 389. — being a case of common law right the remedy is cumulative

12. Mo 653.4.

See was not the word secure purposely adopted to avoid the doubts created by the St of Ann

1774 Donaldson vs Becket was decided only point was the effect of St of Ann

St of Ann said 14 years & no longer no restriction is in constitution —

4 Burr & 2321. 3. 2389. 90. 2405. 6. 7. on the word secure — as different from the word vest.

The judges admitted if secure had been used the right would have remained —

If the language of the Constitution had been used in England there would have been no doubt of its meaning in 1787 —

Cong. could secure for a limited period they could not take away the right or make it perpetual

Fed No 43. Notices the decision in Eng in favor of the common law right

There was no need for the interference of Congress to secure the right because the States could do it by their own authority

The power was given for the benefit of authors & inventors in all the States & to prevent States from embarrassing rights during the period —

Leaving them after that time to abridge or protect common law rights

The act of Congress shows this to have been their meaning — to act on a limited

Fed 32. The power in Cong is not exclusive — either except by — prohibited to the States or by repugnancy to the constitution —

States may protect & preserve what Congress may secure — the common law right is as consistent with a St. right as a C. L. Remedy with a St —

5 Wh 48. 56 A power like this is concurrent & may be exercised by Cong & the States

1 Kt 433 Com. at the same time or after Congress have acted — 5 Wh. 24.

9 J.R. 539 — Argument of Mr Wells

9. J. R. 558. 61. The power to grant patents is concurrent.
12. Wh. 305 — opinion of Thompson J in Ogden vs Saunders —
If Cong have done any thing to impair the right the law is void —
they may annex conditions to the penalty —
They cannot regulate that is they have not the plenary power —
No power can be implied from these words to regulate the right
but only to regulate the right penalty for the right.
Cong can impose no incumbrance on the right —
The deposit of a copy is merely directory it does not make the penalties
Act of 1790 — Sect 4th. no record is required to be made
So as to publication in Newspapers —
If they are made conditions precedent it does impair it —
4 — Plff has a remedy in the Ct Ct of Penn^a
4 article of Const gives to citizens of one State the same rights in all — this clause makes
Vatt B. 1. ch 19 us a nation one nation
this clause applies to property & to all kinds of property copyrights
as well as any other —
This clause about copyright was intended to prevent encroachments by State
laws & to extend the right through the whole country & to prevent
any one State from infringing this right —
The St of Ann is not in force in Penn^a
1. Dall. 384. the common law introduced by the Colonists is in force so far as
1. Dall. 67 — adopted or in use p. 74.
It therefore protects this right as there is no St to take it away —
Penn brought this principle with him
11. March —
5. point.
Act of 1790. 1802. & 1819.
1. Story 94. 1790 — 1. Section gives the right from the recording in the office
2 Section gives actions & penalties
3. is a condition that no person shall have any right till record of
the title page
4 requires a deposit of a copy in Dep^t of State
The 1 & 3. section fix the right on recording
The 2 inflicts the penalties after record & publication
The 4 is a distinct direction not relating to the right or the penalty —
The one is complete & the other incurred before the deposit in State
department — which was not designed for notice
The act of Ann was the model of this — except as notice —
2. Sect of Act of Ann — is analogous — the 1. copy to State Dept is same as 9 to University
The entry in Stationers Hall is same as ~~as~~ the recording
7. T. 620 But is not a condition precedent Maugh. 28. 9. 157 —

Mason 14 Introd. It provides a penalty for not depoſiting the copy
It is a donation from the owner.
Congreſs cannot put a price on the security afforded by law to authors at the hazard of a forfeiture of his right.
The record is a condition precedent. Success as to publication & depoſit within the 2 & 6 months which intervene the right is complete & he has the benefit of the law before theſe acts are done—
Property carries with it its own evidence of ownerſhip—

3. Day. 145. Nichols v. Ruggles— publication & depoſit are directory. Depoſit is not for notice but for a library of which they constitute a part
y. 41. Brant Sup & the books are lent out as others

Act of 1802. 2 Story 865. 1. Section relates to this caſe — and is contended on the other ſide that all the directions of the act of 1790 are by it made conditions precedent

4. Wash. 487— Decides that act of 1790 did not make them conditions precedent—
491— But that act of 1802 has that effect—

The act of 1802 was after the deciſion of T. B in 7 D & E 620 on the 15 Geo 3.
The words give information does not refer to the provisions ~~of act of 1790~~
In addition to requisites means over & above or beſides the requisites
Something ſuperadded to what was before required—
The former law was to remain as it was with this addition.
The calling them requisites does not make them requisites or conditions
Language of an eſtabliſhed meaning in an old law is carried into a new
The acts of parliament in relation to prints & engravings, were made after act of Ann. & directed the name to be printed on it
Cong directed the same thing as to books. to print the record on the title page — which is the beſt & moſt ample notice which could be given
It muſt be with the book & is better notice than the newspaper or copy in the Dept of State—
The law could not intend to create a forfeiture of property for not doing an act wholly unimportant.
The Secretary of State is not required to give a certificate & if he gives one it would not be evidence — tho it was admitted in Circuit Court—
Theſe acts ought to be construed beneficially for the authors not to make conditions precedent of the act of 1790 when they are not ſo
The title is ſupplementary not to repeal or derange the proviſions of the act of 1790—
It would repeal the 1. Sect of act of 1790 requiring the regist on record

The Ct may deliver oral opinions — they may reduce them to writing or not as they please — if they give them to a reporter he who first

4 Espin 168 publishes them has a copy right in them —

8. point —

The Deft's animus is very clear from his circular & answer — he intends it to be a substitute.

He denies he has any rights

The actual violation is in the history the abstracts &c Mr Peters pret=

Rec 11. 15. 16. ends that it is new — each case is preceded by a copious syllabus &c —

He copies the points of the cases from Mr Wheaton also the whole state=ment of the case

He has never gone to the office of the Clerk to make out the statements

The digest of Wheaton's Reports is copied into the condensed reports

The omission of the arguments of counsel does not make an abridgment

Peters disclaimed the intention of making an abridgment —

The Qu. is whether it is a substitute & he so intended if so it is a piracy

1. Am Jurist 160 — 1. Camp 94. 4. Espin. 168. 1. E. 361. 2 Atk 140. 1 Aust 402. 17 Ves 422

1. B. C. 451. 5 V. 5 V. 709 — The Ct look into the papers marked

13. March —

Mr Peters in Prop. Pers.

Rec p 7 — The allegation is contradicted by the evidence in p 56.

Mr Wheaton was not sworn to the bill — his allegations in the bill

p. 3. in relation to the publication in the papers — are unsupported

There is no averment of the fact of deposit it is denied in the answer

p — 16. & must be made out by proof.

If there is enough in bill to give a right the omission of the allegation will not

prevent relief — 5. D. & E. 4. Bing —

p 40. An ex parte deposition of Daniel Brent. He was Chief Clerk in Nov 1817. one year after the publication of the 1 Vol Wheaton —

The 80 copies were received under the Salary act

There appears from this deposition that no copy was deposited no entry or record of it.

p 28. Agreement is to deliver 80 copies for the use of U. States not 81 —

30. do — 32. do — 33. & 34. do.

p 23 deposition of H. C. Carey — no recollection — he accustomed to publish & deposit — but dont doubt it was done —

Opinion of Judge H p. 5.

Rec 26 — The laws about reporters

p — 6 — the claim made here is negatived by the evidence 23. 42. 47.

Read the printed argument of Mr Ingersoll

The Courts can always restrain the publication of their reports
Mr Sergeant on the same side
The question of common law right in England does not arise
The owners of copyright before St. of Anne were the members of the Stationers company & no other
In Roper vs Streater the decision was in favor of prerogative
Millar v Taylor & Donaldson vs Beckett settled the law that the 8 Anne had taken away the common law right.
1694 – The bye law of the Stationers respecting their right subject to prerogative copyright in law books –
We cannot trace the source of the common law on this subject
In Eng the right of an author never depended on mere authorship
Since the St. there must be certain requisites –
No evidence exists of any such common law right in this country
Here it is asserted to be a perpetual right
Copt. cannot touched the notes or arguments of counsel
The part he has asserted is what has been made up by the Court or its order which P Wheaton claims this as his property by the right of authorship
They are not published for the Ct the Reporter ~~but the [illegible]~~
only authentic means of useful information –
3 St. Com – p 50 – It is a mere theoretical question whether the power to secure is exclusive or concurrent till the States pass same law –
Livingston vs Van Ingen has been overruled
There is no common law which can create a national common law right or any judicial decision sanctioning it –
Fed. 43d No – 3 St. Com. 48.9 – State laws had been passed before Constitution on the recommendation of Congress
But since its adoption no State has passed or enforced any law on the subject or questioned the power of Congress –
If there was a preexisting perpetual right how could it be limited to a certain time if their power was not exclusive – as it was to do what had been done in Eng. abrogate the common law
To promote the progress &c by securing for a limited time which is the same as the St of Anne and no longer
This so far from implying negatives any existing right
41. G. 3. 147 – The title is the same as our Constitution
4 Wash 48 – Binns v. Woodruff.
There is no copyright by the common law of Pennsylvania or any evidence or trace of it & there is no national common law
At the settlement of Penn^a^ there was no individual property in law books –

The Reporter is an officer of the Government - the Ct give him
no exclusive right if they had the power -

Mr Webster in Reply.

If Deft has interfered with the rights of Plff it is not accidental or
Rec 54 - without notice - it was intentional & with full notice
Deft sold 1800 copies of his 3 Vol in 6 months after its first publication
He did not contemplate an abridgement but a substitute for Wheaton
the joint production of Plff & Congress its patron
They had fixed the price & Deft might have acquiesced -
Where the publication complained of is ~~a [illegible]~~ not an infringement
in form but substance - the case of Plff ought to be construed
liberally -

1. Has there been an infringement in fact - the substance is the same
It is no abridgement - which is a distinct work -
In Eng different Reporters report the same decisions - they are separate
works each a new composition contemporary -
None of Mr Peters reported cases contain more than Wheaton's - no
book is resorted to for information except Mr Wheaton
It is made out of Mr Wheaton - there is nothing professedly new
It is no abridgement & of course an infringement because Mr
Peters has not resorted to any original source of information
But has taken it from Mr Wheaton
This is piracy tho nothing was original in his book it is enough if
the arrangement was Mr Wheaton's -
Tho the same materials are open to every body & are common yet the
results may be private property -

4 Wh. 209. — In McMillan v McNeal - The opinion of the Ct was reduced to writing
by Mr Wheaton & copied by Mr Peters
The marginal notes of the Reports are the work of Judgement & require
skill - Notes & indexes are the most valuable part of the reports
E.G. the Index to Blackstones commentaries
Summary analysis abstract is as much [illegible] as an abridgement
But Mr Peters does not add to or abridge these abstracts & indexes
The piracy is complete - the omission of the argument of counsel
is no abridgement or omitting any an opinion of a Judge
What is material he takes entire - nothing is copied but the decisions
Mr Peters abridges nothing -
As he takes Mr Peters abstracts & indexes he might as well take his notes
the argument which defends one would defend the other -

5 V. 705. Butterworth v Robinson - Ct enquires whether there was a fair abridgement
or an evasive mode of appropriating the work of another to himself -
& held the omission of the arguments of counsel made no difference

or as to the chronological order
Here there is not even that pretence as the order is followed—
The condition of the Salary is to publish in 6 months & deposit 80
copies for the public
This has no connection with or bearing on the copy right but is a
recognition of his copy right.
If he was required to give his copy right for this salary he would be a
loser — Salary 1000 — 80 copies at 5 = 400 = 600 for copy right.
It is admitted that before the St of Ann there was a common law right
then provided for by the St to a certain extent & as to the rest taken
away—
The Common law was brought to Pa before the St of Ann—
This Ct apply common law to any case suited to its application
The absence of a decided case therefore is no objection to the existence of the
right.
The law of 1790 is a plain declaration of existing rights of authorship
as a copy right in hands of an author his heirs or purchasers—
This right stood on common law right to literary property—
The Constitution recognises the same right. by securing not creating the right—
(Inversely to Sergeant) all laws are passed for the general good — so is this
but it is promoted by the security & encouragement of authors
It is a settled principle in England that an entry in Stationers Hall is
not necessary to give the right
By the Statute of Ann it is complete on publication — the Statute prescribes nothing
to vest the right but acts on an existing & vested right—
1 Vol. L. Mass 94 — The preamble of a law of Massachusetts it is declared a natural right his book is
Property by common sense & consent of all civilised mankind
But Pltff is entitled here under the Statutes of 1790 1802 & '83.
The only objections are that there was no copy deposited in Dept of State
We now appeal from the decision of Ewing vs Coxe in 4 Wash.
If the act of 1790 had stood alone there is no pretence that the 4 section
was a condition precedent
It is a grant with a subsequent & none can complain of a breach but the
grantor
Here the law is express that the deposit may be 6 months after the right has
vested—
Suppose Peters had pirated the work before the 6 months is it now cond
ition precedent—
If the act of 1802 makes it a condition it repeals the 1 & 2 sections & suspends
the whole right for six months — & there may be any piracy comm
itted for the 6 months—
Suppose — it had been a deposit of 100 dolls — the U. S. have a right to it & may
sue for it as a debt.
A book can be cannot be pirated by accident.

Wheaton & Donaldson.
vs
Peters & Grigg.
Notes of Argument. 1834

592. 4. 610. 11-12, 37-
3. 24. 65, 94. 727- 8.

5 May— Wheaton & others vs Peters & Grigg—

Issue directed by the Supreme Court on the question whether a copy of the record was published in the newspaper— & copy deposited in the office of the Secretary of State—

Mr Cadwalader for Plff— opened the matter—

January 1834 Mandate of Supreme Court— May 1834— Order of this Court—

31 Decr 1832. Deposition of Elijah Paine— proving the publication of the record of ~~the record~~ the entry of the Clerk for copyright of Wheaton's Reports— Certificate of deposit from the Clerk Court of New York— admitted under the order of this Court—

~~Deposition of Daniel Brent taken at Paris under a commission~~

Henry C. Carey ~~Sworn~~

Gave the same evidence as in 8 Pt. 726. 7

Wheaton called at my fathers store ~~on his way to Washington~~ immediately after the publication of his first volume he took charge of a quantity of Wheaton's reports to take to Washington— ~~objected— witness admitted~~—

Qu By whom was Mr Wheaton intrusted with the carriage of these books— objected objection overruled— Excepted Deft— by my father or me as his agent I know not the

Cash received— recollect ~~or to [illegible]~~ Applied as to his own use as in 8 Pt. 727— ~~objected admitted— [illegible]~~ Price fixed for a great number of [illegible] but whether they may [illegible] ~~have no recollection as~~ to [illegible] 16. 17. ~~[illegible]~~

Cannot say— ~~objected by deft to any further [illegible]~~

Objected— admitted— Deft excepts— ~~objection overruled~~

For several years before 1820. I know we sent copies to the Dept of State— there could be no contrary practice— it could happen only by accident— Acts advertising my recollection is very much the same

Have no recollection of any thing peculiar as to the 1. Volume different from the others— We never kept advertisements ~~[illegible] a record of advertisements [illegible]~~

× We kept copies of letters— 1 Vol of Wh. R. printed in New York—

11 Bound in Philadelphia—

Deposition of Daniel Brent taken under a commission to Paris by Deft—

80. Volumes of course a single volume—

7. × Inty. Objected by Deft. Objection sustained for the present—

30 April 1832. Offered deposition of Mr Brent taken in the principal cause under the act of Congress—

Objected— admitted— Deft Excepts.

7. May —

Deposition of Robert Greenhow —

11 April 1835. Do Thomas L Thruston — taken by Deft.

28 Octo 1817. ~~Do~~ Deft offer Copy — of a voucher in Dept of State as to 79 copies of decisions of the Supreme Court &c

27. January 1835. Certificate of Register —

Mr Ingersoll objects — it is to prove a fact — this paper is only a certificate ~~and~~ not proof of a fact on oath — of something done by a subordinate — Of a document it may be certified according to law.

H. B. — This is an item of contingent expense paid by Dept of State & audited at the treasury — after this time the act will be presumed to have been done &

Mr Ingersoll — My objection is that the fact is offered to be proved by a certificate instead of common law proof — not for the want of a seal —

& & the nature of the act is such as not to be capable of proof =

H. B. I think the paper ought to be received — [illegible] contra the consequence is as the objection is not sustained — & paper must be read —

Mr Ingersoll then objected for want of a seal

27. September 1834. Deposition of William Elliott —

Mr Cadwallader objects to that part — beginning — in that register. Wheaton's reports is not entered & — Ct overrule the objection —

1. October 1834. Letter from Mr Elliott — agreed to be read —

James Murray Rush.

Went to D of State to Library. looked at 1. Wheaton Reports — on the upper corner of left corner. D State in a small hand — which I think was my fathers — I did not look into the book — as there was objection — believed then it was my fathers

Juror — Thinks this was in Nov — Dec. last. there is some change in fathers hand writing —

Jos. Hopkinson — Examined several copies before S Ct — in session 1816.17 —

Believe Mr Wheaton was at the Sup. Court at Washington winter 1816.17 —

14. June 1828. Letter from Deft to S. Gould — Record 54 —

June 1828. Prospectus of Condensed reports —

Plff closes —

Mr Jos R. Ingersoll for Deft —

Offer a document No 81. 2. Sess. 17. Cong 1822. 3. Plff objects. because the manuscript is not produced or accounted for —

Vide Thruston's deposition.

13. S. & R. 327. Deposition belongs to both parties — & may be used by either.

2. Caines. 131. Witness belongs to party who calls him — the other side read his deposition

read part at request of party & according to the opinion of the Court —

here the deposition was taken D. B. E. & witness may be examined —

Depn don't state that the paper is true — & as a document printed by Congress

it has no authenticity —

Mr Ingersoll —

Dept acts on negative testimony — there is a report from the Dept of State to

Congress — having shown the absence of the book — & publication by Congress —

~~Depo~~ Deposition incorporates this report —

5. S. & R. Moffet vs Somes — this book proves itself — published by public printer

If we had offered this depn — & no objection — we could have read this document —

otherwise we should be taken by surprise — Depn is common property & must be

read entire — & we may show the acts of the Dept of State — that there was in 1822

3 — in existence such a document —

Mr McIlroy.

Best evidence nature of case admits of must be given — this not a sworn copy not

certified copy — or original — or copy of any original paper — only a copy of a list made

out we know not how — lists of the sellers ought to be required — list made out

without notice — not under oath — not compared with the printed list.

It is proved that purchases were made by voucher

The safety of reports & documents like this can be received — unless under evidence

There is a document which will show the fact — & Depn says vouchers are in Treasury —

~~Surveyor~~ must offer is evidence — but a sufficient certificate is not —

Witness cannot purchase — not an act done by him —

Research was not made to ascertain the deposit of books for copyright —

1. H — ~~Court~~ — Court reject the paper —.

14. October 1836. Deposition of William Elliott — taken by defendant —

Offer in evidence a book said to be referred to in the deposition — Objected —

Book not admitted —

13. Octr 1817. Offer letters between Pltff & State Dept certified to be copies under seal — Pltff to D Brent —

16 Octr 1817 — D Brent to Pltff. 25. Octr 1817. Pltff to D. B. 24 Aug 1821. Pltff to D. B. 30 Aug 1822. Pltff to D. B.

12. Decr 1823. Same to Same — 23 Aug 1826. 20 Nov 1826. Pltff to D. B. 24. Nov & B to Pltff.

Levy Hollingsworth

In Octr 1834. I made a thorough examination at Dept of State to find evidence of a deposite of Wheaton's reports for copy right & found none —

Searched register from Decr 1814 to January 1831. first entry was Octr 1831 —

the 1. Vol 2. Edition was the only one — Searched in library the room over it & in the patent office & the books on the shelves in one of the alcoves found 12 Vols Wh Rep the 1. Vol was not of the same sett — U. S. Dept of State written in it on the corner was D. State — the 11 Vols were labeled on outside Dept of State U. S. Some of the books had on them Depd for copy right & name of Wheaton had it & signed W Thornton — by the appearance of these so marked — no copy of the 11th there of any volume found a catalogue of books of the Dept of State in patent office books from 1802 to 1825 — receipts — or Depd — for copy right — I next examined the letter book at the patent office — it began in 1818. & I found nothing there about Wheaton Reports —

Qu did you see any entries made by Mr Barry — Objected — & not admitted —

Juror — Whole search was thorough one — would know if these books had been there — opened a great many books — no classification of books

Juror — Went at request of Mr Peters & voluntarily for the purpose & there was my first visit there —

8 May.

Mr Ingersoll offered sundry certificates from the department of State Vide — record — 58. 9. Mr Cadwallader objected — Papers admitted — papers read —

Wheaton et al
vs
Peters et al —
Notes of evidence on the trial
of the issue — 1838.

2. G. & L. 129 —

Will Mr Peters & Mr Cadwallader make out a statement of the entry as it appears on the record — H. Baldwin —

This note was written in consequence of an intimation made yesterday by Mr Ingersoll while Mr Mallory was addressing the jury — the Ct observed that they would receive no new evidence — or have the matter stated in Court then — but advised that it be mentioned in the morning while the jury was sitting —

The above note was written this morning — while Mr Mallory was going on the paper 1 was handed to me by Mr Peters & 2 by Mr Cadwallader I remarked that no notice would be taken of the matter without consent — If parties would consent — I would alter the issue accordingly —

Mr Cadwalader offered the agreement — A

Wheaton
v
Peters

Cummins

Memo at trial 1838.

In the 1st vol: of Wheaton's Reports, on the second page, after the title page is printed the following

District of Pennsylvania ss.

Note the 40th year of the Independence was 1815

Be it remembered that on the twentieth day of December in the fortieth year of the Independence of the United States Mathew Carey of the said district hath deposited in this office the title of a book, the right whereof he claims as proprietor in the words following viz

"Reports of Cases argued and adjudged in the Supreme "Court of the United States February term 1816 by Henry Wheaton "Counsellor at Law Volume 1."

In conformity to the act of Congress of the United States, entitled "an act for the encouragement of learning by securing the copies of maps charts and books to the authors & proprietors of such copies during the times therein mentioned" and also to an act entitled "an act supplementary to an act for the encouragement of learning by securing the copies of maps charts and books to the authors & proprietors of such copies during the times therein mentioned, and extending the benefits thereof to the arts of designing engraving & etching historical & other prints.

D. Caldwell
Clerk of the District of
Pennsylvania

1 Wheaton's Reports has the imprint

Printed by Van Winkle, Wiley & Co
No 1. Greenwich Street New York

Vol. 1.

Philadelphia
Published by Mathew Carey
1816

The entry in the office of the Clerk of the District of Pennsylvania. States in words

District of Pennsylvania ss.

Be it remembered that on the Eighteenth day of December in the forty first year of the Independence of the

the United States A D 1816

Mathew Carey of the said district hath deposited in this office the title of a Book the right whereof he claims as Proprietor in the words following to wit

Reports of Cases argued and adjudged in the Supreme Court of the United States February Term 1816 by Henry Wheaton Counsellor at Law Volume 1.

In Conformity to the act of Congress of the United States entitled " an act for the encouragement of learning by securing the copies of maps Charts and Books to the authors & proprietors of such copies during the times therein mentioned" and also to the act entitled " an act supplementary to an act for the encouragement of learning by securing the copies of maps Charts & Books to the authors & proprietors of such copies of maps Charts & Books to the authors & proprietors of such copies during the times therein mentioned" & Extending the benefits thereof to the arts of designing, Engraving & etching historical & other prints

D. Caldwell Clerk of the District of Penn.

Differences between the printing in first Wheaton & the Entry in the Clerks office —

Printed in 1st vol.	Entry in the Clerks office
Twentieth of December	Eighteenth of December
Fortieth year of the Independence	Forty first year of the Independence

Differences Continued

Printed - Entry in the office

an Act of Congress the Act of Congress -

2 Wheaton

Entered in the office of the Clerk of the Southern District of New York — 1st day of September in the Forty first year — this was 1816

This volume was published in New York by Robert Donaldson in 1817

The Certificate of the Clerk states the entry to have been made on the 1st September in the forty second year } difference 41 in vol 42 in Cert.

3 Wheaton

Printed as Entered in the office of the Clerk of the Southern District of New York in the forty second year

Published in New York in 1818 —

The Certificate of the Clerk of the Southern District of New York is that the deposit was made in the Forty third year.

difference — Printed to have been entered — the forty second year — Entered — the forty third year

~~vol 4~~.

Vol. 10

Printed entry states the entry to have been in the 49th year of the independence

Clerks Certificate the 49 year

this was the year 1824

The volume, 10 Wheaton, was published in 1825 — difference Entered — 1824

Published — 1825 —

Vol 12

Published in 1827

Printed in the volume to have been entered
in the 51st year of the Independence

Certificate of the clerk as Entered in
the 51 year

The 51 year was 1826

Wheaton v Peters

It being alleged on behalf of Defendant that certain discrepancies in words & figures exist between the records in the Clerk's Office and some of the words & figures purporting to be Copies thereof inserted on the page next to the title page of some of the volumes in question viz volumes 1. 2. 3. 10. 12 It is agreed that said discrepancies may be recognized by the Court and Jury so far as the same may be deemed relevant, any thing to the Contrary thereof in the order of this Court directing this Issue notwithstanding — this agreement not be Construed as an admission that the Existence or non-Existence of said discrepancies is material to the present Issue

Wheaton v. Peters—

× This is not a ſuit or caſe brought by either party or at their requeſt—

× The matter before you is an iſsue merely on certain facts—aſserted
on one ſides denied on the other—as the foundation of a wager

× ~~This a ſ~~ This is a proceeding in Courts of Chancery who have no
power to ſummon juries to try facts—

× The Chancellor decides facts or not according to his diſcretion

× When he refers the fact of a caſe to a jury it is in law language
to inform his conſcience—that is for information—how to decide
on the evidence in the caſe—

× This is not an arbitrary diſcretion for in England & New York
his decree will be reverſed if he orders an iſsue when he ought
not—where appeals lie on interlocutory orders of the Ct of Ch. See in U.S. Cts

× Or if he does not order one the H of L. or Ct of Appeals will
order it to be done—but they retain the cauſe—caſe nothing ſent out—

× A will is never ſet aſide in Chancery without iſsue D.V.N.

× But whether a Ct of Chy or a Superior Court directs an iſsue
it is to inform its own Conſcience not that of another Court—

× When a Ct of Ch does it they take the verdict & firſt decide whether
A. the jury have in their opinion done juſtice by their finding

× If they approve it a decree is made—if not a new trial is granted

× The jury decide on the facts referred to them according to the
rules of law & the evidence—as in other caſes

This Court is one both of law & Chancery—when we direct an
× iſsue in a Chancery cauſe—it is merely to take the opinion
of a jury on the evidence inſtead of deciding it ourſelves & give
a charge as in a common law action—

B × When this is done it is common to give directions as to the evid=
ence to be received what ſhall be conteſted & what not—

B. Or we may make ſuch orders on the trial as will meet the
juſtice of the caſe—& do not proceed by the mere rules of Law—

C Nor in granting new trials are we governed by thoſe rules—

& The Court which directs the iſsue decide—their conſcience muſt
be ſatisfied

× Acting under the order of the Supreme Court we must conform to it according to its terms as we judicially understand it - not as we or one of us may conjecture -

× They have put their intention in writing as our guide & if their order is doubtful we must refer to their opinion -

× We must not act on our opinion of the proper course for that Court - They have taken their own which we cannot reverse in any part -

× Had they retained the cause & directed an issue without reversing the decree of this Court we should have had no difficulty as the law of equity prescribed a rule of action for you & us -

× But as a course has been taken which appears a novelty to us we cannot find a rule in the books to guide us -

× The decree rendered in this Court by Judge Hopkinson was the injunction dissolved & bill dismissed which is a declaration that the Plff had no right to claim the aid of a Court of equity - In the words of J. H. Let the complainants go to the law side of the Court &c 8 Pt. 741.

× This decree was reversed & the Cause was remanded to this Court with directions to order &c 698 at the bar - i.e. on the law side - 2 things

× 1. To try an issue of facts - &c but give no directions by what rules -

× 2. That such further proceedings be as to law & justice & opinion

× The first direction is to us as a Ct of Law - how is the second -

× We can go no further as a Court of Law the verdict must be reported & acted upon in a Court of Equity - & we must proceed as such Courts

× By the rules of equity as contradistinguished from Courts of Law as Courts of Equity in England 1. Story 258. the proceed at. ~~1.6.6.267~~

× The law of Equity & the justice of Equity is different from that of Law - As a will defective in law & good in Equity which cures the defect. 1.6.6.267 -

× Justice done by a verdict is one thing at law & different in equity -
New trial in a suit at law would be granted for reasons which would
C. not avail in equity - the order there wants explanation -

× We must proceed in conformity to the opinion of the Sup Court. 741.

× In their opinion they say on reading the evidence we entertain doubts which induces to remand the cause &c 667.

× What doubts - Vide 668. those of the S. Ct not ours - we had none as a Court - Judge H. was clear that there was no evidence of the fact - as matter of fact 727.8. Or inferable from the evidence as matter of legal presumption - 728.9.

× What then did the Supreme Court mean by further proceedings in the cauſe—

× The firſt ſtep would be for us on the equity ſide of the Court to decide

× Is the Court ſatiſfied with the verdict—i.e. are both Judges ſatiſfied if not there muſt be a new trial 4. Waſh. 37. adopting the rule—

× Now it has ſo happened that there has been a radical difference of opinion between the Judges of this Court on the law & facts of this caſe—

× Expreſsed on the motion to diſsolve the injunction in 1831—

× I did not ſit when the decree was pronounced—had I ſat alone it would have been different—I diſsented from the Sup Court

× But am now bound by their deciſion ſo far as it goes—on the law—

× The Conſtruction of the acts of Congreſs & the queſtion of a Common law right of authorſhip are ſettled according to J. H. opinion

× But a very important queſtion remains undecided—on which he & I differed & yet differ & muſt differ till the S. Ct ſettle it—

× That is whether the Law does not in this caſe preſume the facts in iſsue from the facts admitted by both parties—or clear proof

× Whether this is a Qu of law of fact or a mixed one it is important—

× J. H thinks it does not apply in this caſe—I think it does

× He would not be ſatiſfied with a verdict founded on ſuch preſumption—nor I if it was not conſidered— by the way his reaſons are 728. mine—of the caſe—35—

× So that following the rule eſtabliſhed by Judge Waſhington there muſt be a new trial let the verdict be as it may—

× We agree as to the effects of a legal preſumption if it applies here We differ on its application only—& ~~here~~

× We have often charged juries on it in Bain v W. J. in G. Y. & S. v W. &c—

× The point was made in the Sup Ct. 8. Wh. 594. 5. 610. 11. 12. 37. 43. 7.

× They knew our difference of opinion & have made no direction by which we were to be governed—

× This preſumption is aſserted in a Court of law in place of evidence to ſupply its loſs by time accident or the acts of a party—

× In a Court of equity it is aſserted that time & poſseſsion give the poſseſsor a right to an injunction till the title is diſproved by an infringer

Here the mandate of the Court is important—as to the rule of law & juſtice

× In Parker v. Nixon it is law equity & juſtice 9. Pet. 540.

× —In both caſes the S. C. have reaſoned on grounds not taken by counſel or by Court

× They act on their own peculiar views & opinions without discussion at the bar so as to explain the reasons of the course they take—

× It is therefore not proper for us to conjecture their motives or grounds.—
It would be a matter of extreme delicacy in any case where their words did not furnish a clue—

× We are bound to presume that when they reverse our solemn decrees merely to acquire information for themselves which neither this Court or counsel want. they mean what they say—and deliberate on every word

× In both these cases we are peculiarly bound to do so—
We humbly think the Court have departed from settled usage of the Sup. Ct.

× This Court had expressed themselves explicitly as to domicil in one case & publication & deposite in the other—on fact & presumption—

× The Supreme Ct. want something else we must give it & as they ask it—

× When they thus act we have no discretion—the order is positive & we Are not to our own hand—9. Pet 540.

× And they will not construe their own orders when we cannot ask them to do it 10. Pet. 411.

× This is the unpleasant situation in which this Court act under orders instead of the discretion which is left to us in ordinary cases—

× When our orders are free to inform our own conscience—as we know what we want from a jury—we can find out how to get it & know what rules are to be adopted & we can decide whether the verdict satisfies us—

× But when the Sup. Ct orders are free to be tried by us—to satisfy their conscience

× We are only to look to our orders—to their doubts—& the particulars—

× If we are to decide any thing we must know the rule Law or Equity—

× These are the difficulties into which we have been thrown unwillingly
We must get over them as well as we can—

× Instructions have been asked of us by both parties—where we can agree we ~~[illegible]~~ shall give them as these of the Court—

× Where we cannot agree—we refuse because if the Court does not agree to any proposition—it is refused—which means we do not agree to give it—

Sub. to J. H.

This is a peculiar case - its history.

A suit in equity for an injunction to prevent the publication of Peters' condensed reports.

Injunction was issued by consent - on a hearing before Judge Hopkinson the injunction was diſsolved & bill diſmiſsed.

On an appeal to the Supreme Court the principles laid down by Judge H. were affirmed by that Court - in which they decided

That Mr Wheaton's right depended on the acts of Congreſs & that he had no right by Common Law independently of the acts of Congreſs

that he must comply with its requisites or his copyright was void.

1. Record with the Clerk of the state & district 2. Entry on the Title leaf.

3. Publication in the newspapers.

4. Deposite in the department of State

Precisely on the same grounds & for the same reasons as J. H. had done.

But the S. C. reversed the decree not because there was error in the decree in law or fact but as the Supreme Court have said in their opinion

Read from 667.

Judge H did not want this information - ~~& did~~

The Sup Ct want it for themselves & have taken this mode of procuring it.

Reversed the decree opened the whole case in terms but in effect only to the points No 3. & 4.

We are therefore acting under an order of the Sup. Ct. not as in common cases

By your aſsistance to give that Court the information they have called for

Not on matters of law which were apparent on the record before them.

So that we & you are like arbitrators acting under a special submiſsion.

The object then being to give that Court information - or to inform its conscience on the subject matter which they have referred to us.

So far as that Court has decided any question of law it must be taken as settled

As to No 3. they have said nothing as to any rule of law.

As to No 4. Read. 665.7.

Nor can a presumption be made of the deposite of one copy for copyright as evidence of the delivery of the 80 copies under the reporter's law.

Read mandate 698 - this is what you are to do -

We are not to construe the law but must construe the mandate.

Inſtruction 1. Refuſed – No 2. Do – 3. Do –
No 4. Inſtruction granted – as evidence of fact &c 9 Pet 699.
We admitted it because it was in former record &c
No 5. refuſed – 6. Do –
No 7. If the law would juſtify any inference from the proof of the fact, the ſame
inference would reſult from its admiſsion
But we refuſe to charge that any inference can be drawn.
8 – Under the mandate of the S. Ct we refuſe to inſtruct you to enquire whether
the publication was made by any other perſon than Mr Wheaton or the Proprietor
9. X ~~Refuſed~~ Reſident States means a State in which Mr W or Pr. reſides –
Tho the law ſays printed in the United States we muſt on this mandate take
it that the Sup Ct conſtrues it to mean reſident State
Mr Carey was the proprietor of the 1. Vol. Therefore ſubmitted to J. H – F. K.
10 – The law ſays – to be publiſhed for the ſpace of four weeks –
The mandate ſays for four weeks – which is the conſtruction of the S. Court –
This is to be the ſubject of your enquiry was it publiſhed for four weeks –
11. The law ſays as to the depoſite of the book – within 6 months after the publiſhing
thereof – this refers to the publication of the book
The Mandate ſays – after referring to the publication in the papers –
Whether after the publiſhing thereof &c Read 699.
This refers to the publication of the book – by the general terms ✱ 665.
12 – To be preſerved in his office – for the purpoſes of the law – in analogy to St of Ann 737 ✱
This made it office property – there could be no property in the Author in the
ſenſe in which property is underſtood –
He has neither the right of poſseſsion uſe or ſale – which are the incidents of property
His only intereſt in the book is as evidence of the fact of depoſite – 665.
13 – Negligence in Department is not impeachable offence –
14 – Refuſed –
15 – By St – publication in any paper printed in New York or Penn^a the reſident States,
tho a weekly one for four weeks is enough by the law or the order of S. Court.
With theſe inſtructions – the caſe is ſubmitted to you on the whole evidence
in the cauſe – to decide the two queſtions ſubmitted by the S. Ct & iſsues
& ſhape your verdict according to their order – opinion – the iſsues & declaration –
I forbear any expreſsion of my own opinion except ſo far as – has been done on the
ſubject of legal preſumption
Beyond that – I hold it my duty not to go in this matter –

You may find generally for Plff if you find for him on all the volumes & or against him generally as you may think
If you are of opinion for Plff on one volume & Deft on another
Or on one fact for P. & another for D— you will specify—
You may or may not state whether you find on the direct evidence of the particular facts or the presumption of the law from lapse of time the possession of Plff & the notice & recognition of Deft— this is a matter on which you may be governed by your own discretion—

After this charge was delivered Mr Ingersoll moved— for a certificate under the act of 1802—

Wheaton & Do vs Peters & G— 1.

2 Story 856 Compare the act of 1802 ſect 6 with the laſt deciſions of the S. Ct.
There were two opinions delivered at the laſt term on its conſtruction
10. Pet. 288. "There was not in ſtrictneſs any cauſe in Court"
"Points which may be certified muſt ariſe upon ſome queſtion
289 – "ariſing on the trial." Vide 290.
Suppoſe this to have been a trial within the meaning of the Court –
the oppoſition of opinion muſt be at the trial –
In this caſe there was no point on which there were oppoſing opinions
till Judge H. left the Court – except on the admiſsion of the receipt of
$. 1.25 certified from the Treaſury – but both judges afterwards rejected it –
the queſtion aroſe which was not decided by the Court –
In the argument certain inſtructions were aſked by counſel on
both ſides – but the Court could not give any opinion on them
till they ſubmitted the matter to the jury –
there could then be no oppoſing opinion as there was but one judge
But had there been two – they might do either of two things –
1. declare a difference of opinion on the inſtructions moved for –
9 Pet 241–72. diſcharge the jury & certify the points –
2. Give the inſtruction or refuſe it – in either caſe we might agree
to diſagree tho we did not diſagree in fact – or agree to agree tho
we did not agree
As in the firſt caſe Parker vs Nixon & in the ſecond Jackſon vs Aſhton –
To the parties it makes no difference – if we give or refuſe an instruction – an exception may be taken
When either party moves the Court for an inſtruction & the Court
10. Pet. 290. are divided the motion fails & conſequently is refuſed – & if the
refuſal is wrong it is error.
We may aſſign what reaſons we pleaſe for the refuſal. ~~[illegible]~~
In this caſe both judges agreed to refuſe all inſtructions on which
they could not agree –
The judge who charged the jury refuſed the inſtruction whereby
the party complaining has his remedy –
Tho he gave his reaſons for the refuſal – it did not alter its effect –
So on the admiſsion of evidence – if the Court is divided the objection
is not ſuſtained & the evidence is admitted – on which an exception is
taken – as if both Judges had agreed –

But an iſsue directed by this Court is not the trial of an action
A bill of exceptions would be a novelty – there muſt be a motion
for a New Trial – 3. Wash. 298. for the courſe & rules of proceeding on
ſuch motion in this Court Vide 4 ~~W~~ Wash. 368.
There can be no judgment on the verdict & of courſe no writ of error –
The only mode of reviſing the verdict or the acts of the Court, being
by a motion for a new Trial which is a matter of diſcretion, it
is not reviſable in the S. Ct on error.
10. Pet. 289. Nor by a certificate of diviſion becauſe it is a matter of diſcretion –
S.P. 366. 411.
__Beſides__. An iſsue is a proceeding merely auxiliary to the ſuit in
the equity ſide of the Court – merely for information to the Court.
There cannot be even an __introductory__ judgment or decree –
And if there could a diviſion of opinion on it could not be certified
9. Pet. 273. Vide reaſons given by the Ch. Juſtice.
__Again__ – The verdict muſt be certified or entered on the equity ſide
of the Court which directs the iſsue, to whom the motion for the
New trial muſt be made. Coop. Eq. Rep. 97 – 2 Dick. 437. 576. 11. V. 52.
Becauſe being directed to ſatiſfy the conſcience of the Court which directs it
the conſcience of another Court or Judge cannot be the rule of deciding –
The Queſtion of granting a new trial is therefore merely diſcretionary
with the Court of Equity who makes the order – & if it is ſatiſfied with
the verdict – the facts ſo aſcertained can be only introductory to a decree
on the equitable matter of the bill –
This points to the proper courſe after a verdict. the firſt motion is for a
new trial – which is at the term after the verdict is given – 11. V. 52.
If refuſed the cauſe goes to a hearing & a decree is made in conformity with
the verdict – from which decree an appeal lies & the appellate Court
decides on the whole caſe ~~on the~~ equity appeared – 11. V. 52: 5. John. Ch. 153 –
In this caſe there would be no uſe in a new trial becauſe the Court
would not be ſatiſfied with a verdict for either party on the preſent
iſsue & order – for both Judges muſt be ſatiſfied 4 Wash. 38.
The S. Ct may reverſe the decree & remand the cauſe with new directions
if they adhere to their preſent practice
The proper way would be to retain the cauſe in that Court & make the order,
This is the reſult if the cauſe is conſidered to be in the Ct. Ct. under the mandate

We decree conformably to the verdict ſo far as it goes to the merits — ſo on the whole evidence as it was before us at the trial. analogous to the Courſe in England — in caſes where iſsues are directed —

1. By the Ct of Chancery — The Judge or Court which tries it certifies the verdict & ſends his notes of the trial to the Ch. with their opinion whether they are ſatiſfied or not.

2. By the Ct of Exchequer — who direct the iſsue to be tried at the bar of the Ex on the law ſide — 2. Sch & Lef. 667.

In either caſe the whole evidence is conſidered on the motion for a new trial — & the only queſtion is whether the Ch or Equity Judge is ſatiſfied with the verdict. 9. V. 166: 19. V. 499. 509: 3. Cond Ch. 37: 4 Wh 368.

If the Ch directs an iſsue to be tried at the bar of the C. B. he may order a new trial at the Bar of the K B. 1. V. Jr. 28. and may grant ſucceſsive trials till his conſcience is ſatiſfied — in 2 Vernon 285. a caſe is cited where there were 5 trials — Vide 10. V. 499 — 13. V. 297. 308: 2. Sch & Lef 667.

He is therefore not bound by a verdict & as the only rule on the ſubject is the conſcience of the Ch. the rules of law in granting new trials do not prevail — he enquires only whether juſtice has been ſubſtantially ~~done~~ — Amb. 210. 323: 19. V. 503: 3. V. & B. 42: 1. Cond Ch 386 — 11. V. 53: 9. V. 166: 1. John. Cas 506 — 2. Mad. Pr. 474 &c. 1. Dow P. C. N. S. 139: 2 Bligh P. C. N. S. 106 — Vide 2. Sch & Lef. 667: 8 V. 536 — 3. D & E. 539. 49: 4 D & E. ~~571~~

After the Ch is ſatiſfied he decrees on the evidence not merely on the verdict — that governs only when the evidence is very doubtful balanced he goes on the Equum & bonum of the caſe as if there had been no iſsue & on an appeal the verdict thus approved by the Ch has no other effect in the H of Lords than they think it entitled to —

If not ſatiſfied on the general equity of the caſe they will reverſe the decree notwithſtanding two Verdicts — Pr. Ch 165: 2. Vern 446. 1. B. P. C. 58. 60 — 3. Lev. 411. Sho P. C. 96: 17. Journ. H. L. 389 —.

Tho Ld Hardwick thought that the Lords did a very extraordinary thing 1. V. Jr. 509. the courſe ſeems to be ſettled —

An appellate Court will ſet aſide an order for an iſsue & diſmiſs the bill 1. John Caſes 498. 506 —.

Such is the courſe of Equity on an iſsue it is otherwiſe where an action is directed to be brought & tried at law on a queſtion of law —

In such cases the motion for the New trial is to the Court of Law they give a Judgment & it is binding on a Court of Equity if the case turns on the question of Law—1 Mad Pr. 90. 2 Mad Pr. 475 &c & cases cited Whether an issue or an action is directed by a Court of Equity they retain the cause & wait the result at law—in either case the rules & course of further proceedings are plainly defined But this case is an anomaly in all respects—

The Supreme Court affirm all the points of law decided at the hearing—but have doubts about the evidence of facts which are material to the merits of the whole case in equity—Instead of retaining the cause & directing an issue to inform their conscience before they affirm or reverse the decree—they refuse to decide what facts are proved by the evidence they reserve nothing to themselves—but reverse the decree without alledging any error of Law or fact—send the whole cause back with an order for an issue—& further proceedings according to law justice & their opinion—

Without a precedent for such a course one in my opinion in opposition to both precedent & principle we look in vain for any rules to guide us—

We cannot tell what verdict will satisfy their conscience—of which we are not the keepers—nor is our conscience theirs—The Court which has directed the issue has not reserved any power to act on the cause—we can report nothing to them—till the case goes back on an appeal which can be only after a final decree—In directing further proceedings they have omitted "Equity" We may supply it & consider the mandate as intended to give us the same power to make a new decree as in the original case Proceed as if the issue had been directed by ourselves—& then the S. Ct will decide on our final decree whether the two facts as to which they had doubts on the evidence in the former record are or not so proved as to satisfy their conscience—

I can perceive no other course while we remain without instructions from the Supreme Court on the question of Legal Presumption & the alledged rule of Equity in favor of an apparent right & posses= under it without interruption x78.

.97 Wheaton v. Peters - 10. Cond Ch. 224

Evidence of pedigree 10 Cond Ch. 224.

Affidavits in injunction 238.

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Wheaton v. Peters — In granting N. Trial Ct. act on whether their conscience is satisfied 9 V. 166
1 S. Car. 402-4. Iſsue directed out of Chancery — tried before a Judge of the Sup. Court at
the Circuit. New Trial granted by the S. Court.
1 Cains 487. So if an inquest is improperly taken relief must be in S. Court
B. 2 C. R. 124.5 Ct will not wait Pltffs convenience but order the iſsue to be tried at term [illegible]
× 1. C. C. 257. B The will is tried at law — on an iſsue party shall not set it up — as Ch will ever defeat —
I. 3. Cond Ch. 37 Ch looks at whole case & trial to see whether on the whole Jus. is satisfied 19 V. 499. 509 —
1 S. Car. 506 & On a case stated for the opinion of a Court of law the Ch is not bound
10 V. 498. 507 Nor by a verdict on an iſsue of fact it is only to inform his conscience 9 V. 166
1 S. Car. 506. Awarding iſsue is in the sound discretion of Ch. & ought not to be done when he
can decide it. 6 J. C. 257. 6 Cr. 22. 3 V & B. 43. 1 Mad Pr. 90. 2 Mad P. 474. &c.
2. Ch. D. 1065. Ct of Ex don't direct iſsue but order the matter to be heard before the whole Ct —
× 5 J. C. 149.50 Ch may order the proofs in the cause to be read on trial of an iſsue B
1 V fr. 28. 30 After trial in C. P. it may be tried in K. B. on an iſsue &c. on a case directed for opinions
B C. P. 1 V. 500 — Contr. 9 Mod 5 unleſs Judges give their reasons. Vide. 19 V. 500.
5 J. C. 153. When iſsue is returned & at a subsequent term the cause is set down for
11 V. 52. a hearing on the equity reserved — a new trial may be moved for —
158. If N. trial is granted the former verdict may be given in evidence 1 V fr. 28.
× 6 J. C. 256. On a rehearing the evidence in the cause may be read 1 V & B. 335. 40. 41.
1 Sw 550 If Ct. of law certify that Pltff has no title in a Chy suit Ch will not dismiss bill
2. Ch. D. 1060. In Ex cause is set down for further hearing & give verdict & Judgt in evidence B
× where an action is directed (if no order to admit the Probate evidence must be read 15 V. 176.
× 1 Cox 184. Judge who tries the cause to decide whether deposition of an old witness be read
(1 V & B. 344.)
Coop. 97 — On an iſsue directed by the Court the motion for a New trial must be to the
D. Court directing it. 1 B. P. C. 58. 1 V fr 28.
2 Ch. D. 1067. If an action is directed it must be to the Court which tries it. 2 Anst. 178.
Cooper 96. 19 V. 499. Rules in Eq on N. T. different from Ct of law 9 V. 170 —
5 Cond Ex. 60 — No motion in arreſt on trial of an iſsue
2 Ch. D. 1068. Leave given to bring an action & refuse all further consideration till the
verdict 4 B. P. C. 460. 692. 1 Sw. 73. 1 B. P. C. 58. 3 Cond Ch. 170.1.
11 V. 53. Will never set aside without an iſsue & V. Ann. 1 Mad. Pr. 90 — 13 V. ~~[illegible]~~ 297. C
2 Ch. D. 1070. The object of an iſsue is obtained when the conscience of Ch is satisfied that
3 Cond Ch. 378. at the trial justice has been substantially done. 1 Dow N. S. 139 — 2 Bligh N. S. 106
11 V. 53. A new trial not granted because proper evidence was rejected — or because the
1 Cond Ch. 386 Judge made an improper representation of the effect of deps. answer.
3 V & B. 42. Or misdirected the jury on the doctrine of a legal presumption 19 V. 503.
Anst. 210 — If justice is done 223 — Four trials 9 Van 285 —

Wheaton vs Peters –.

Notes of evidence & points of law –

8 May— Wheaton et al vs Peters & Grigg—

Mr Cadwallader for Plff—

Acts of Congreſs requires 4 Requiſites

1. Entering in the Office of the Clerk of the District Court— this is admitted—

2. Entering on the title leaf a copy of the Clerks Certificate— Do—

3. Advertiſing in the Newspapers—

4 Depoſiting a copy in the Department of State—

Ct will charge— that the jury cannot preſume that the 4 Vol was sent to the Dept of
1. State by gift or any other purpoſe than as a depoſite for copy right— in the abſence
of evidence to shew a contrary purpoſe— Refuſed this instruction
We may conſiſtently with the deciſion of the Supreme Court shew that by the con:
2. ſent of the Reporter & Secretary of State appropriate one copy as a depoſite to be kept in
the office under the patent law— Refuſed
1. Binn 502— 12. Wh   aſsent of the Reporter will be preſumed to such appropriation it being
3 for his benefit— Refuſed
4. Court will instruct the jury that the certificates offered by Deft. Rec. 58.9. or if offered by
Plff would not be evidence of the fact of depoſit— charge—
2. Penn— 262. In this caſe after the enjoyment of the copy right & the admiſsion of Deft
in his poſſeſsion & letter— the law preſumes that the neceſsary acts have been done
5. or throws the burthen of proof on the Deft to the contrary. Refuſed—
Alſo on the legal effect of all the evidence given— & each deſcription— Not
Mr Mallory referred to various caſes & principles on the doctrine of legal preſumptions
6 on which he should rely— after which Mr Ingerſoll stated that he asked the
Court to instruct the jury directly the reverſe of what Mr Cadwallader & Mallory
have requeſted on the principles of legal preſumption— Both refuſed—

Mr J. R. Ingerſoll for the Deft—
7 No fact admitted by the order of the Court in making up the iſsue can bear on
the facts directly in iſsue—
8 Pt. 566. Shews the points ſubmitted by the Court & deciſion of the Supreme Court—
8. Reſident State means the reſidence of the Publiſher— of author.
Supreme Court referred the facts to a Jury— not legal preſumptions— & the jury
9. have nothing to do with preſumptions as leading to reſults— only look to the proof—
knowledge is not notice where a statute requires notice to be given
10 9 May. Publication for the ſpace of four ~~months~~ weeks—

Story 96. 866. Court will define what this means

(Qu. Resident State — what does it mean what are we to do about it —

(Tell the Jury it must be in the State which is the residence of the Author Propri=
ietor either is sufficient)

2 As to deposite —

11. Law is to deposite in 6 months — Mandatory (omitting the word 6 months

× This means publishing in the newspapers —

The time of publication is material —

12 The Book to be deposited is the property of the author — but to remain there forever —

13. ~~Pltf~~ after an imputation of an impeachable offence to Secretary of State —

14 — The Ct will charge that there is no presumption of law in favor of Pltff.

Mr Mallory for the Pltff.

We have some right to the benefit of presumptions from facts admitted as facts proved

Could not file bill to perpetuate testimony for want of party.

The same rules of law & evidence apply to this as all other cases —
long required no special mode of proof

10. May.

Wheaton vs Peters–
points of law & Instructions–1838–

Donaldson v Peters & Grigg

Mr Donaldson is the Plaintiff in this Suit. Mr Wheaton not having sworn to the Bill is no Party.

Mr Donaldson presents himself before the Court as a bona fide purchaser for a valuable consideration from a person in possession without notice of any dispute about the right of property in the thing purchased. He has had the quiet & undisturbed possession for the whole term which the law allows to Copyrights & two months of a renewed term before any Contest or Notice of any. Until the publication of the 3d volume of Condensed Reports no intention was ever avowed to interfere with the Plff's Copyright but was distinctly disclaimed in the Prospectus — the Bill has been filed in a reasonable time. The Plff claims under Colour of a Copyright under the Act of Congress and a right existing at Common law secured by Act of Congress. The Supreme Court has defined — Colour of title — to be a claim of right or title to the thing possessed And have also decided that an Injunction is a proper remedy to protect possession

In this Stage of the Cause there are three questions

1. Has the Plaintiff had the exclusive possession of the right & property claimed.

2. Has it been under colour of title.

3. Has defendant disturbed or threatened to disturb such possession

Answering these Questions in the affirmative the Injunction must be continued till the right is decided –

On the final hearing there are two questions

1. Has the Pltff the right he claims by having complied with the requisitions of the laws of Congress

2. Has he such right by any means as accompanied by a long possession for such length of time as has been shewn precludes the defendant from contesting it in a Court of Equity

It must be distinctly understood that on this motion my opinion is confined exclusively to the three first questions

The two last are entirely open on the final hearing. I have been thus explicit to avoid misunderstanding.

C J Murray

1 Wheaton R. 349. The power of removal is certainly not in strictness of language an exercise of original jurisdiction. It presupposes the

Donaldson
vs
Peters
Abstract_

On the argument of the motion to dissolve the injunction in this case in 1831. 2- the Judges of this Court were divided in opinion on the law & evidence. The final decree was rendered in the absence of one of the Judges, on appeal the Supreme Court affirmed the principles of law which were applied by the Circuit Court to the acts of Congress on the subject of Copyright but reversed the decree remanded the cause & directed an issue on certain facts- That issue has been tried & a verdict rendered for the Pltff & a motion made for a new trial

On the merits of this motion the Judges are divided in opinion One is satisfied with & approves of the finding of the Jury the other is dissatisfied with & disapproves of it.

In ordinary cases the division of opinion on a motion for a new trial is a refusal & Judgment goes on the verdict In the trial of issues a different rule prevails in this Court a new trial is granted if the Court is not satisfied with the verdict 4 Wash 37-

In this case however no verdict can satisfy both Judges & if a new trial is now awarded & the issue is found for the Deft a new trial must be granted for the same reason which now prevails in that the Court, (both Judges) are not satisfied-

This would be placing the parties in an endless circle unless there should be new evidence the existence of which is not pretended- This difference of opinion would be certified to the Supreme Court but this course might lead to further delay as that Court might not entertain Jurisdiction of a case certified on a motion for the new trial of an issue- or other questions arising before a final hearing- The whole cause is remanded for our action by an issue & for a final decree- On the principles decided by the Supreme Court- that decree depends on the facts involved in the issue. the Judges cannot agree as to the evidence on which such facts depend or whether they are correctly found by the Jury-

In this unpleasant dilemma there is great difficulty in proceeding- No appeal lies to the Supreme Court till a final decree is rendered No decree can be rendered where by the Court (both Judges) can make the verdict of the Jury the basis of their judgment on the evidence - any decree which can be made must be rendered with the distinct understanding that the finding of the Jury is neither approved or disapproved by this Court - but that the merits of the decree are to be examined by a reference to the evidence submitted & to the Jury. That the Supreme Court with the whole evidence before them may do what this Court cannot do - decide on the effect of the evidence in the same manner as they would do if [illegible] former decree had not been reversed - the cause had been retained in that Court & they were directed to satisfy their consciences on the facts to be ascertained

In such case the motion for a new trial would be made to the Supreme Court & not to this court our only duty would be to certify our proceedings preparatory to this issue - the finding of the Jury & that we were divided in ~~our~~ opinion whether the the verdict was right or wrong -

By this course the decree would be considered as only pro forma in order to have a final decision in the Supreme Court - on the whole case without any effect being given to the finding of the Jury on one hand or any implied disapprobation of it by a decree on the other - in the one case approving in the other disapproving such finding - so as to leave its effect & bearing on the decree either way entirely open as fully so as if this Court had never acted upon it by any decree or order whatever -

Wheaton vs Peters

Minutes of H. Baldwin

Submitted to Counſel —